UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HEALTHBRIDGE MANAGEMENT, LLC, 710 LONG RIDGE ROAD OPERATING COMPANY II, LLC d/b/a LONG RIDGE OF STAMFORD Petitioner, v. NATIONAL LABOR RELATIONS BOARD Respondent.	)	15-1110 Petition for Review

PETITION FOR REVIEW

Pursuant to Rule 15(a) of the Federal Rules of Appellate Procedure, Petitioners Healthbridge Management, LLC, and 710 Long Ridge Road Operating Company II, LLC d/b/a Long Ridge of Stamford, petition this Court to review and set aside the ruling in the attached Decision and Order of the National Labor Relations Board that Respondents violated Section 8(a)(3) of the National Labor Relations Act by discharging employee Patrick Atkinson in the matter of "HealthBridge Management LLC; 710 Long Ridge Road Operating Company II, LLC d/b/a Long Ridge of Stamford and New England Health Care Employees Union, District 1199, SEIU, AFL-CIO" dated March 24, 2015 and reported at 362 NLRB No. 33.

By: _____
Bernard P. Jeweler

Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
1909 K Street, N.W., Suite 1000
Washington, D.C. 20006
(202) 263-0248

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on this 21st day of April, 2015, the foregoing **Petition for Review** was served upon the following persons at the addresses shown below via Federal Express and was filed with the Clerk of the Court which will send notification of the filing to the following persons at the addresses shown below:

Linda J. Dreeben
National Labor Relations Board
Appellate and Litigation Branch
1099 14th Street, N.W.
Washington, D.C. 20570

New England Health Care Employees
Union, District 1199 SEIU
77 Huyshope Avenue, Floor 1
Hartford, CT 06106

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UNITED STATES COURT OF APPEALS
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HEALTHBRIDGE MANAGEMENT, LLC, 710 LONG RIDGE ROAD OPERATING COMPANY II, LLC d/b/a LONG RIDGE OF STAMFORD	)	
Petitioner,	)	15-1110
v.	)	
NATIONAL LABOR RELATIONS BOARD	)	
Respondent.	)	

DISCLOSURE STATEMENT OF PETITIONER
HEALTHBRIDGE MANAGEMENT, LLC

Petitioner Healthbridge Management, LLC ("Healthbridge"), by and through its attorneys Ogletree, Deakins, Nash, Smoak & Stewart, P.C., pursuant to Federal Rule of Appellate Procedure 26.1 and Local Rule 26.1, declares that it is 100% owned by Care One LLC and that no publically held company has a 10% or greater interest in any of the entities identified above.

A supplemental disclosure statement will be filed upon any change in the information provided by this statement.

By: _____
Bernard P. Jeweler

Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
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Washington, D.C. 20006
(202) 263-0248

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on this 21st day of April, 2015, the foregoing **Disclosure Statement of Petitioner HealthBridge Management, LLC** was filed with the Clerk of the Court which will send notification of the filing to:

Linda J. Dreeben
National Labor Relations Board
Appellate and Litigation Branch
1099 14th Street, N.W.
Washington, D.C. 20570

By: _____
Bernard P. Jeweler

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HEALTHBRIDGE MANAGEMENT, LLC, 710 LONG RIDGE ROAD OPERATING COMPANY II, LLC d/b/a LONG RIDGE OF STAMFORD Petitioner, v. NATIONAL LABOR RELATIONS BOARD Respondent.	15-1110

DISCLOSURE STATEMENT OF PETITIONER 710 LONG RIDGE ROAD OPERATING COMPANY II, LLC d/b/a LONG RIDGE OF STAMFORD

Petitioner 710 Long Ridge Road Operating Company II, LLC d/b/a Long Ridge of Stamford ("Long Ridge"), by and through its attorneys Ogletree, Deakins, Nash, Smoak & Stewart, P.C., pursuant to Federal Rule of Appellate Procedure 26.1 and Local Rule 26.1, declares that it is 100% owned by Care Realty, LLC and that no publically held company has a 10% or greater interest in any of the entities identified above.

A supplemental disclosure statement will be filed upon any change in the information provided by this statement.

By: _____
Bernard P. Jeweler

Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
1909 K Street, N.W., Suite 1000
Washington, D.C. 20006
(202) 263-0248

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on this 21st day of April, 2015, the foregoing **Disclosure Statement of Petitioner 710 Long Ridge Road Operating Company II, LLC d/b/a Long Ridge of Stamford** was filed with the Clerk of the Court which will send notification of the filing to:

Linda J. Dreeben
National Labor Relations Board
Appellate and Litigation Branch
1099 14th Street, N.W.
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By: _____
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HealthBridge Management, LLC; 710 Long Ridge Road Operating Company II, LLC d/b/a Long Ridge of Stamford *and* New England Health Care Employees Union, District 1199, SEIU, AFL–CIO. Cases 34–CA–073303 and 34–CA–080215

March 24, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS JOHNSON AND MCFERRAN

On November 1, 2013, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief.[1] The General Counsel filed cross-exceptions with supporting argument, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order as modified and set forth in full below.[4]

We adopt the judge's findings that the Respondent did not violate Section 8(a)(3) and (1) by discharging employee Tyrone Williams,[5] but did violate the Act by discharging employee Patrick Atkinson.[6] In finding Atkinson's discharge unlawful, we agree with the judge that *Atlantic Steel Co.*, 245 NLRB 814 (1979), provides the proper framework for analyzing the conduct for which Atkinson was discharged: leading a group of employees into the office of the Respondent's center administrator, Polly Schnell, to present complaints about working conditions (the "walk-in").

Under *Atlantic Steel*, the Board considers four factors to determine whether an employee's conduct is so egregious as to lose the Act's protection: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was provoked by the employer's unfair labor practices. Id. at 816. We find, contrary to the Respondent's exceptions, that the first three factors strongly favor finding that Atkinson's conduct remained protected.

As to the first factor, the walk-in took place in Schnell's office, away from any patient care area, and there is no evidence either that the conversation was overheard by patients or visitors, or that it disturbed the Respondent's operations.[7] As to the second factor, Atkinson was clearly engaged in protected concerted activi-

[1] The parties stipulated that, for purposes of this case, Respondent HealthBridge Management, LLC (HealthBridge) is a joint employer of the employees of Respondent 710 Long Ridge Road Operating Company II, LLC d/b/a Long Ridge of Stamford (Long Ridge); the events at issue here occurred at the Long Ridge facility. References to "the Respondent" in this decision refer to both Respondents.

[2] The parties have implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] The Respondent asserts that the complaint is invalid because it was issued under the authority of the Acting General Counsel, who was not properly appointed under the Federal Vacancies Reform Act. For the reasons stated in *Benjamin H. Realty Corp.*, 361 NLRB No. 103, slip op. at 1 (2014), we reject this argument.

The Respondent has excepted to the judge's consideration of a prior Board decision and several administrative law judge decisions involving the Respondent and/or affiliated companies as evidence of anti-union animus. We find merit in this exception insofar as we agree that the judge erred by considering cases that are currently pending before the Board. See *St. Vincent Medical Center*, 338 NLRB 888, 888 (2003) (a judge's decision pending before the Board is not binding authority), remanded on other grounds 463 F.3d 909 (9th Cir. 2006). Contrary to the Respondent's exception, however, we find that the judge did not err in considering a prior Board decision as background evidence of animus. See *Barnes & Noble Bookstores, Inc.*, 237 NLRB 1246 fn. 1 (1978), enfd. 598 F.2d 666 (1st Cir, 1979). In light of *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), however, we do not rely on the recess-Board case cited by the judge, *Somerset Valley Rehabilitation & Nursing Center*, 358 NLRB No. 146 (2012). Instead, we rely on *HealthBridge Mgmt.*, 360 NLRB No. 118 (2014) (Respondent violated Sec. 8(a)(1) by unlawfully removing flyers from union bulletin boards and prohibiting employees from wearing union stickers).

[4] We have modified the first paragraph of the judge's recommended Order to identify the Respondents' joint employer status and to include the location as the Long Ridge facility; we have deleted par. 2(c) as duplicative of par. 2(f); and we have corrected inadvertent references to Region 1. We have also modified the recommended Order in accordance with our decisions in *Excel Container, Inc.*, 325 NLRB 17 (1997), and *Indian Hills Care Center*, 321 NLRB 144 (1996). In adopting the judge's recommended tax compensation and Social Security Administration reporting remedies, we rely on *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014). Finally, we have substituted a new notice to conform to the Order as modified and in accordance with *Durham School Services*, 360 NLRB No. 85 (2014).

[5] We find it unnecessary to pass on the judge's finding that employee Tyrone Williams never engaged in any union or protected concerted activity. Even assuming arguendo that he had, the General Counsel failed to make a showing of unlawful motivation sufficient to meet his initial burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[6] The record shows that, by letter dated February 2, 2012, the Respondent informed Atkinson that he was terminated.

[7] See *Datwyler Rubber & Plastics, Inc.*, 350 NLRB 669, 670 (2007) (first *Atlantic Steel* factor favors continued protection where the discussion at issue took place in a private location away from the customary work area and other employees and, therefore, did not disrupt work or undermine discipline) (citing *Noble Metal Processing*, 346 NLRB 795, 800 (2006)).

ty when he informed Schnell of employees' concerns regarding recent disciplinary actions and other terms of employment. As to the third factor, the credited evidence shows that the walk-in led by Atkinson was similar to previous walk-ins. Atkinson's remarks were extremely mild, merely informing Schnell that the group was there to discuss concerns about employees being suspended unfairly and that the employees had lost confidence in Schnell's leadership. While talking, Atkinson held a grievance in his right hand and touched his left palm with it as a gesture indicating emphasis. Atkinson did not refuse an order to leave Schnell's office nor did he attempt to prevent Schnell from leaving. In short, there is no credited evidence that Atkinson engaged in any menacing or abusive behavior of the kind that the Board has elsewhere found weighs against continued protection.[8] Finally, we find that, because there is no evidence that Atkinson's conduct was provoked by any unfair labor practice, the fourth factor weighs against finding his conduct retained the protection of the Act. This factor, however, is outweighed by the other three *Atlantic Steel* factors, which strongly support a finding that Atkinson's conduct retained the protection of the Act. Accordingly, we find that the Respondent's discharge of Atkinson violated the Act.

ORDER

The National Labor Relations Board orders that the Respondent, joint employers HealthBridge Management, LLC and 710 Long Ridge Road Operating Company II, LLC, d/b/a Long Ridge of Stamford, Stamford, Connecticut, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because of their union or protected concerted activity of protesting employee working conditions.

(b) In any like or related manner interfering with, restraining, or coercing employees in the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Patrick Atkinson full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Patrick Atkinson whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(c) Compensate Patrick Atkinson for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Patrick Atkinson, and, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Stamford, Connecticut facility, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such

[8] In arguing that Atkinson's conduct during the walk-in lost the Act's protection, the Respondent relies on the testimony of Larry Condon, the regional operations director for HealthBridge. However, in crediting the testimony of Atkinson and the other employees who had firsthand knowledge of the walk-in, the judge implicitly discredited Condon's testimony as to what had occurred. Accordingly, although we agree with the Respondent that the judge erred in finding that Schnell did not report Atkinson's conduct to Condon until "[s]ome days after the incident," this factual error does not affect our analysis.

The Respondent further maintains that the judge improperly considered whether Schnell's affidavit describing the walk-in, which was proffered in lieu of her testimony, was admissible as an exception to the hearsay rule because the Respondent did not offer it as substantive evidence of Atkinson's misconduct. We find it unnecessary to pass on the judge's hearsay findings regarding Schnell's affidavit because, even had the judge considered the affidavit for the purposes asserted (to show that Schnell's description remained constant over time and that no adverse inference should be drawn from her failure to testify), that would not change the result here based on the credited evidence.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 2, 2012.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 34 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. March 24, 2015

Mark Gaston Pearce, Chairman

Harry I. Johnson, III, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge employees because of their union or protected concerted activity of protesting employee working conditions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Patrick Atkinson full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Patrick Atkinson whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL compensate Patrick Atkinson for the adverse income tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating Atkinson's backpay to the appropriate calendar quarters.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Patrick Atkinson, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

HEALTHBRIDGE MANAGEMENT, LLC AND 710 LONG RIDGE ROAD OPERATING COMPANY II, LLC D/B/A LONG RIDGE OF STAMFORD

The Board's decision can be found at www.nlrb.gov/case/34-CA-073303 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

Jo Anne Howlett, Esq., for the General Counsel.
George W. Loveland, Esq. and *Nicole Bermel Dunlap, Esq.*, counsel for the Respondents.

DECISION

STATEMENT OF THE CASE

Raymond P. Green, Administrative Law Judge. I heard these consolidated cases in Hartford, Connecticut, from June 25 to 28, 2013. The charge and the amended charge in 34–CA–073303 were filed on January 26 and March 30, 2012. The charge and the amended charge in 34–CA–080215 were filed on May 3 and July 11, 2013. The complaint was issued on September 28, 2012, and alleged as follows:

1. That HealthBridge, Care Realty, Care One, and 710 Long Ridge constitute a single integrated enterprise and/or joint employers.

2. That on or about January 27, 2012, the Respondent, for discriminatory reasons, discharged Tyrone Williams.

3. That on or about February 2, 2012, the Respondent, for discriminatory reasons, discharged Patrick Atkinson.

On June 13 and 14, 2013, the parties entered into a stipulation wherein it was agreed, for purposes of this case that any actions taken by or on behalf of Long Ridge by HealthBridge of by any agents of officials of HealthBridge are binding on Long Ridge. Also, it was stipulated for purposes of this case, that HealthBridge is a joint employer of the employees of Long Ridge and that these two companies will be jointly and severally liable if the unfair labor practices are sustained. As a consequence, the names of Care Realty, LLC, and Care One, LLC were withdrawn from the case and I have removed them from the caption.

The General Counsel's theory as to Atkinson is that he and a group of about 15 to 20 employees engaged in a "walk in" where they went into the office of Polly Schnell to present grievances or complaints about working conditions. The General Counsel contends that this was protected concerted activity. The Respondent asserts that while in the office, Atkinson engaged in threatening conduct and blocked Schnell from leaving her office.

As to Tyrone Williams, the General Counsel acknowledges that his conduct on January 7, although perhaps warranting some form of disciplinary action, did not in accordance with past practice, warrant his discharge. She posits that after the incident occurred, the company decided to impose a discharge action against him because Atkinson, the union steward, brought the matter of Williams to Polly Schnell on January 12. It is not asserted that Williams engaged in any prior union or protected concerted activity. It seems that the General Counsel's theory is that Williams was, in effect, collateral damage due to Schnell's annoyance at Atkinson. Additionally, it seems that the General Counsel's is also contending that that the decision to discharge Williams was made at the corporate level and was related to the Respondent's overall antiunion animus. Presumably, the idea here would be that in the context of bargaining, it would be in the Respondent's interest to play hardball and utilize any situation to demonstrate its toughness towards the Union.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS AND CONCLUSIONS

I. JURISDICTION

It is admitted and I find that the Respondents are employers engaged in commerce within the meaning of Section 2(1), (6), and (7) of the Act. It also is admitted and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

A. Background

There have been a number of cases involving these Respondents and affiliated companies.

In *Somerset Valley Rehabilitation & Nursing Center*, 358 NLRB No. 146 (2012), the Board issued a decision finding that the Respondent violated Section 8(a)(1) and (3) by issuing discipline and discharging various employees because of their union activities and by reducing the hours of per diem employees. The Board also concluded that the Respondent violated the Act by interrogating employees and by soliciting grievances. The events of that case occurred in 2011 at a different facility.

On January 15, 2013, an ALJ issued a decision in JD(NY)–012–13 involving a case in New Jersey. In that case, the immediate respondent was Somerset Valley Rehabilitation & Nursing Center. The Judge noted that this was part of a group of facilities owned and operated by HealthBridge Management, Inc. and CareOne Management, Inc. both maintaining their corporate offices and IT department at Bridge Plaza in Fort Lee, New Jersey. The ALJ concluded that Somerset violated the Act by making unilateral changes without bargaining in violation of Section 8(a)(5) and by discharging two employees in violation of Section 8(a)(1),(3), and (5). She also concluded that Somerset violated the Act by refusing to provide the union with access to its facility in order to inspect work process and working conditions including health and safety conditions. That case is currently on appeal.

On August 1, 2012, another ALJ issued a decision in a series of cases involving a group of Respondents including HealthBridge Management; Long Ridge of Stanford and other affiliated enterprises. In that case, the ALJ concluded inter alia; that the Respondents violated the Act by (a) threatening to call the police in response to employee protected concerted or union activity; (b) failing and refusing to supply timely and complete information requested by the Union; (c) unilaterally and without the consent of the Union, laying off employees without providing the union with a contractually required notice; (d) modifying the collective bargaining agreement by implementing a new eligibility standard regarding holiday pay, personal days, vacation days, sick days and uniform allowances; (e) unilaterally implementing certain other changes in working conditions; and (f) laying off and refusing to hire employees without notifying the Union as required by the terms of the contract. That case is also currently pending appeal.

In addition, there is currently in process a case involving HealthBridge before still another judge. That hearing has not yet been completed and obviously no determinations have been made.

As of the time of this hearing, the Respondents and the Un-

ion, which have had a history of bargaining, had been involved in protracted negotiations for a new contract to replace the existing contract that had expired in March 2011. Thereafter, in December 2011, the Respondent locked out certain of its employees at another facility after having advised employees at several of its other facilities that it might engage in a lock out if no agreement was reached. The General Counsel cites the lockout and the threat of a lockout to furnish evidence of antiunion animus. I don't agree. Parties to collective bargaining are legally entitled to utilize or threaten to utilize legitimate economic weapons, such as strikes and lockouts to advance their respective bargaining positions. Assuming that one or the other party chooses to utilize its economic weapons merely means that it is engaging in conduct that is permissible under the Act.

On the other hand, a recent past history of unlawful conduct, can be used to demonstrate antiunion animus and can be taken into account when deciding the present case.

B. Tyrone Williams

The transactions that underlay this complaint started on Saturday, January 7, 2012, when Tyrone Williams was working as a porter. It should be noted that Williams was not a person who in any way, was active in the Union.

On this day, a long term patient was being discharged and was going home with her family who needed assistance in bringing down her belongings. Kathleen Treacy, the director of social services was acting as the manager on duty and it was her responsibility to facilitate the discharge of the patient who was going to be transported to her home by an ambulance service.

During the discharge process, Treacy paged housekeeping on several occasions and no one responded. At the time, Williams was the third floor housekeeper. On the third page, when no one showed up, Treacy commented to the patient's family that no one was responding at which point, Williams who was standing nearby, said that he was here and belligerently asked her if she knew who he was. He continued in this vein and she tried to calm him down. Treacy told him that the family needed help to bring down the patient's belongings and he essentially said that this was not his job, "sweetheart." Nevertheless, he relented and did help. When Treacy saw him outside by the van, she said that she wanted to speak to him in private and when she went through the door, she saw in the glass reflection, that he made a gesture that she interpreted as being a threatening gesture. Another witness to this incident described William's gesture as being a mocking gesture. Treacy both verbally and in writing, reported this incident and this generated an investigation by Schnell. In addition to writing up her side of the story, statements were later obtained from the two people from the outside service that were present.

On January 9 or 10, Schnell spoke to Williams and told him what Treacy had reported regarding the January 7 incident. At this meeting, Williams was accompanied by another employee whose name is Tequila Watts. Williams denied the accusations completely and he was asked to provide a statement as to what took place on that date. Tequila Watts later went to shop steward Atkinson (who was not present at the facility) and told him about the meeting.

On January 12, Atkinson and Watts went to see Schnell and asked Schnell to tell them what William's was being accused of. Schnell responded that he knew perfectly well what it was about; that she was fed up with him and that he should leave her office.

Atkinson and Watts then told Williams that they were not told what he was accused of and Williams wrote out a statement to the effect that although he was willing to cooperate in an investigation, he (Williams) did not know what he was being accused of and therefore had nothing to say. This was obviously an evasion since both he and Watts had been told about Treacy accusations 2 or 3 days before. Also, since Watts told Atkinson about that earlier meeting, I find that it is not credible that Atkinson was unaware of what William's was being accused of. Accordingly, I can see why Schnell got annoyed and told him to leave her office.

On Friday, January 13, Williams submitted a statement which essentially said that he did not know what he was being accused of. Later in the day, Schnell told Williams that he was being suspended pending an investigation. When asked for a more detailed recitation of what he was being accused of, Schnell gave Williams a notice that stated that he was being suspended for "inappropriate interaction with a supervisor."

On January 16, Williams tendered a second statement regarding the January 7 incident. In this statement, he placed the blame on Treacy, who he described as being sarcastic and disrespectful to him. Somewhere around this time, the two people from the outside company were solicited to give statements and they did so. As noted above, these two individuals basically supported the version of the events given by Treacy.

On January 27, 2012, the Respondent discharged Williams. There were a series of conversations among Schnell and her superiors, Larry Condon, the Regional operations director for HealthBridge and Ed Remilliard, the Regional human resource director of HealthBridge. Basically, they decided to believe the version of events as described by Treacy and to disbelieve the version of events described by Williams. They also assert that the conduct was sufficient to warrant a discharge instead of some lesser punishment. And essentially, it is the degree of the punishment that is the issue here because although the General Counsel concedes that some punishment was warranted, she asserts that a discharge was not. Of course, we are not trying an arbitration case here and a prerequisite for finding a violation of the Act is also a finding that the discharge was motivated, at least in part, either by union or protected concerted activity by Williams or others.

So how can we compare Williams with similarly situated employees in the past? Those situations involving discharges are as follows. [1]

The company's records show that Sylvia Taylor and Iris

[1] It perhaps should be kept in mind that at this time, the contract had expired and the arbitration procedures available to employees under the expired contract were no longer available. As such, the situation that had existed under the collective bargaining agreement was somewhat different inasmuch as the possibility of arbitration was no longer a constraint on disciplinary actions.

Brown were discharged because both were involved in an incident that involved a heated exchange which was accompanied by finger pointing, shoving and yelling. Further, the argument reached such a level that the doors to the residents' rooms had to be closed. After being initially suspended pending an investigation on January 13, 2011, both were discharged on February 4, 2011.

Willie Dickerson was discharged on October 19, 2010. The discharge letter states inter alia;

> The reason for this termination is your unprofessional and inappropriate conduct, including, but not necessarily limited to your threatening physical and verbal actions towards another staff person and your use of vulgar, profane and derogatory language.

Letifa Wright was discharged on September 20, 2010, for "unprofessional and inappropriate conduct. The company's records show that the incident precipitating her discharge involved her angry response to phone calls made by residents. This however, was not her first offense. In June 2009, she received counseling after she made a threatening phone call to a co-worker. In December 2009, she received a one day suspension and a final warning for a "verbal altercation which disturbed the operation of the facility." In August 10, 2010, Wright was suspended pending investigation for "rude and threatening behavior."

The General Counsel offered records showing that various individuals received discipline short of discharge. It is her position that these were cases that were similar to the January 7 incident involving Williams.

On January 31, 2007, the Respondent gave a one day suspension to Yvelon Saveur for "insubordination." This was later reduced to a warning for "disobedience." The records indicate that in his case, Saveur refused to complete an assignment given to him by his supervisor.

On February 15, 2007, the Respondent issued a five day suspension to Monica Gayle, after she had received two previous disciplines. It is not clear from the records as to the nature of the incident precipitating her February 15 suspension.

On November 3, 2008, a warning was issued to Erik Michel. The records indicate that he told his supervisor, "Don't start with me," after they had some dispute about a parking space.

On December 1, 2010, the Respondent issued a 3-day suspension to Jennifer Baker for insubordination. The records indicate that when she was asked to perform a task by the Nursing supervisor, she refused.

C. Patrick Atkinson

Mr. Atkinson has been employed by the Respondent since 1993. He also has been a union delegate (functionally a shop steward), for a long time and has actively participated in many grievance proceedings. There is nothing in this record to suggest that the company's representatives did not deal with him in a professional manner or that any employees were ever disciplined because of his role during grievance proceedings.

As noted above, Atkinson played a role in the Williams' affair in that he went to see Schnell after he was told that Williams had been accused of wrongdoing. As previously noted, she ordered him to leave her office. In my opinion, this had nothing to do with his subsequent discharge.

On January 19, Atkinson organized a protest by employees that was referred to as a "walk-in." These apparently had been conducted in the past. In this instance, he and a group of about 15 other employees walked into Schnell's office where they stood silently by the wall as Atkinson spoke. At the time, Schnell was seated at her desk and working on her computer. Atkinson held a grievance in his hand and stated that they were there to address concerns about employees being suspended unfairly. He also stated that the employees had lost confidence in her leadership. The evidence is that while talking, Atkinson held the grievance in his right hand and touched his left palm with it; apparently as a gesture indicating emphasis. And despite the Respondent's claim to the contrary, there is no competent evidence to show that Atkinson banged his fist into his hand; made any kind of menacing statements or gestures; or positioned himself in such a way as to prevent Schnell from leaving her office. After a very short period of time, Schnell left her office stating that she was uncomfortable with the situation and did not return. Soon thereafter, the assembled employees also left her office and as they did, Atkinson saw Schnell and said; "No justice, no peace."[2]

Some days after the incident, Schnell reported it to her superior Larry Condon who testified, subject to objection, as to what she told him. Schnell also gave an affidavit to the Respondent's counsel regarding this incident which was proffered in lieu of her testimony.

The Respondent asserts that Condon's testimony regarding what Schnell told him fits within an exception to the hearsay rule; namely Rule 803(a) relating to present sense impressions. This rule permits hearsay regardless of whether the declarant is available as a witness if it is a "statement describing or explaining an event or condition, made while or immediately after the declarant perceived it." Condon's testimony would be tantamount to receiving Schnell's unsworn and uncross-examined description of the events on January 19. In my opinion, his testimony regarding her statements does not fall within this exception to the rule against hearsay as it was neither made during nor immediately after the transaction described.

Similarly, I cannot hold that an affidavit given to Respondent's counsel is an exception to the hearsay rule where there has been no opportunity by the opposing party to cross-examine the witness at the time it was given. Rule 804(b)(1)(A) & (B) provides an exception to the rule against receiving hearsay for former testimony where the declarant is not available. In some limited circumstances the Board has received affidavits taken by NLRB Regional Office personnel where the witness is no longer alive.[3] *Weco Cleaning Specialists*, 308 NLRB 310 fn. 7 (1992). But unless the witness is truly unavailable, such affidavits are not receivable. *Park Maintenance*, 348 NLRB 1373,

[2] In my opinion, this is a somewhat dated slogan and should not be construed as a threat.

[3] I should note that during the investigatory phase of an NLRB proceeding, Board agents are required to be neutral and therefore affidavits taken by a Board agent are not the same as statements or affidavits taken by counsel representing a party.

fn. 2 (2006), and *Marine Engineers District 1 (Dutra Construction)*, 312 NLRB 55 (1993). See also *NLRB v. St. George Warehouse*, 645 F.3d 666 (3d Cir. 2011), enfg. 355 NLRB 488 (2010), where the Court held that the hearsay testimony of the deceased discriminatee's mother regarding her son's post-termination search for alternative work was admissible in a backpay proceeding to show that the discriminatee had engaged in a reasonably diligent search for work.

In the present case, the Respondent asserted that Schnell did not want to testify and that counsel was not willing to have her appearance compelled by judicial process. To me this is not sufficient to show that she was unavailable. Accordingly, her affidavit is inadmissible hearsay. [4]

The bottom line is that there was no one who testified on behalf of the Respondent who could offer admissible testimony that contradicted the testimony of Atkinson and the other employees who described the events on January 19. The only question is whether that conduct, clearly concerted, lost its protection by virtue of the standards set forth in *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979).

III. ANALYSIS

In *Atlantic Steel*, the Board established a balancing test for these types of situations. In determining if an employee's concerted conduct relating to conditions of employment loses the protection of the Act, the Board will take into account and balance the following factors; (a) the place of the discussion; (b) the subject matter of the discussion; (c) the nature of the employee's outburst; and (d) whether the outburst was provoked by the employer's unfair labor practices.

In my opinion, the evidence shows that the "walk-in" by Atkinson and the other employees constituted concerted activity that related to conditions of employment. The record shows that this was done in a way that had some precedent in the past and that the employees did not refuse to obey any order to leave Schnell's office. The entire transaction was of extremely short duration and there is no evidence that Atkinson's conduct involved any threats, menacing conduct, or any attempt to impede Schnell from leaving her office. On the basis of this record, it is my opinion, that Atkinson's conduct was protected by Section 7 of the Act and accordingly that his discharge for this event constitutes a violation of Section 8(a)(1) and (3) of the Act.

On the other hand, I do not believe that Williams was discharged for any illegal reason. He had never engaged in any union or protected concerted activity and there would have been no particular reason to pick him out for anti-union retaliation. The General Counsel theorizes that instead of warning or suspending Williams, the company made the decision to discharge him because of its general antiunion animus as shown in prior cases or because Atkinson, as a union steward, inquired on his behalf on January 12, 2012.

In accordance with *Wright Line*, 251 NLRB 1083 (1980), approved *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), if the General Counsel makes out a prima facie showing sufficient to support an inference that protected or union activity was a motivating factor in the decision to discharge or take other adverse action against an employee, then the burden shifts to the Respondent to demonstrate that it would have taken the same action in the absence of the protected activity.

In my opinion, the assertion that the Respondent decided to overly punish Williams because of Atkinson's meeting with Schnell is simply too far-fetched. Anything is possible, but I view this theory as being so unlikely that it cannot, in my opinion, give rise to a prima facie case. Although a bit more possible, the idea that the Respondent, which clearly had good cause to discipline Williams, decided to discharge him because of its overall animus demonstrated by other cases involving other facilities, is also a very thin reed.

In the present case, the evidence demonstrates, and the General Counsel basically concedes that the company was justified in imposing some form of discipline on Williams for his behavior on January 7. While his conduct may not have risen to the level of Dickerson, Sylvia Taylor, and Iris Brown, it was not as trivial as General Counsel would suggest. In my opinion, the evidence shows that Williams refused to respond to a call; that he badgered the supervisor on duty; that he insulted her and made a sexist comment to her; and that he mocked her when they were returning into the building after the patient had been discharged from the facility. These actions were done in the presence of other employees, a resident and her family, and the employees of the service that was picking up the patient.

The General Counsel also suggests that the Respondent did not make a thorough investigation before discharging Williams. But in my opinion, the investigation was more than adequate especially since Williams, in his initial response, chose to be evasive and claimed that he didn't know what he was being accused of despite being told a few days earlier. By the time that the discharge decision was made, the company had statements from Treacy and two other witnesses who contradicted the second statement that Williams had provided on January 16. We are not litigating whether the company violated the Act by not doing a thorough investigation of this incident. To the extent that this is an issue, it is only one insofar as it would tend to show whether the company treated Williams in a disparate manner. And in my opinion, it did not.

In my opinion, the evidence does not establish that the Respondent discharged Williams because of antiunion reasons or for any other reasons that would violate the Act. On the contrary it is my opinion that the preponderance of the evidence shows that the only reason he was discharged was because of his behavior on January 7, 2013.

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[4] In *Park Maintenance*, 348 NLRB 1373, 1373 fn. 2 (2006), the Board reversed the admission of affidavits in the absence of a showing that the affiants were unavailable to testify, but found that this constituted harmless error because the judge discredited the statements in the affidavits. In *Marine Engineers District 1 (Dutra Construction)*, 312 NLRB 55, 55 (1993), the Board held that the judge properly refused to accept the affidavit of a nonappearing witness, where the proponent did not allege that the affiant was unavailable to testify. However, in *Three Sisters Sportswear Co.*, 312 NLRB 853, 865 (1993), enfd. mem. 55 F.3d 684 (D.C. Cir. 1995), cert. denied 516 U.S. 1093 (1996), a pretrial affidavit of a frightened witness who was a current employee and who claimed not to remember anything about her affidavit other than her signature, was received as past recollection recorded under Rule 803(5).

CONCLUSIONS OF LAW

1. By discharging Patrick Atkinson, because of his protected concerted activity in leading a union protest concerning conditions of employment, the Respondent violated Section 8(a)(1) and (3) of the Act.

2. The aforesaid violation affects commerce within the meaning of Section 2(6) and (7) of the Act.

3. Except as found herein, the other allegations of the Complaint are dismissed.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having concluded that the Respondents are responsible for the unlawful discharge of Patrick Atkinson, they must offer him reinstatement, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). The Respondents shall also be required to expunge from their respective files any and all references to the unlawful discharge and to notify the employee in writing that this has been done and that the unlawful discharge will not be used against him in any way. The Respondent Employer shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. The Respondent Employer shall also compensate Atkinson for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year. *Latino Express, Inc.*, 359 NLRB No. 44 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondents, HealthBridge Management, LLC and 710 Long Ridge Road Operating Company II, LLC, d/b/a Long Ridge of Stanford, their officers, agents, and representatives, shall

1. Cease and desist from

(a) Discharging employees because of their union or protected concerted activity of protesting employee working conditions.

(b) In any like or related manner interfering with, restraining, or coercing employees in the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Patrick Atkinson, full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Patrick Atkinson whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this Decision

(c) Remove from its files any reference to the unlawful actions against Patrick Atkinson and within 3 days thereafter, notify him in writing, that this has been done and that the discharge will not be used against him in any way.

(d) Reimburse Atkinson an amount equal to the difference in taxes owed upon receipt of a lump-sum backpay payment and taxes that would have been owed had there been no discrimination against him.

(e) Submit the appropriate documentation to the Social Security Administration so that when backpay is paid to Atkinson it will be allocated to the appropriate periods.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful action against Atkinson and within 3 days thereafter, notify him in writing, that this has been done and that the discharge will not be used against him in any way.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at the Long Ridge facility in Stamford, Connecticut, copies of the attached notices marked "Appendix."[6] Copies of the notices, on forms provided by the Regional Director for Region 1, after being signed by the Employer's authorized representative, shall be posted by the Employer and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Employer customarily communicates with its employees by such means. Reasonable steps shall be taken by the Employer to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Employer has gone out of business or closed the facilities involved in these proceedings, the Employer shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Employer at any time since January 27, 2013.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated: Washington, D.C. November 1, 2013

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or discipline employees because of their union or protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the rights guaranteed them by Section 7 of the Act.

WE WILL offer Patrick Atkinson, full reinstatement to his former job, or if that job no longer exist, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him.

WE WILL remove from our files any reference to the unlawful actions against Patrick Atkinson, and within 3 days thereafter, notify him in writing, that this has been done and that the discharge will not be used against him in any way.

HEALTHBRIDGE MANAGEMENT, LLC; 710 LONG RIDGE ROAD OPERATING COMPANY II, LLC D/B/A LONG RIDGE OF STAMFORD